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Supreme Court of the United States

October Term, 1958

No. [redacted] 72

PAUL CASTELLANO, *Appellant*
~~Petitioner~~,

against

COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

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No. .....

PAUL CASTELLANO,

APPELLANT ~~Petitioner,~~

against

COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

(a) Opinions Below

The court of original jurisdiction wrote no opinion. The opinion of the Appellate Division is reported at 7 App. Div. 2d 48, 180 N. Y. S. 2d 496, under the name of *Commission of Investigation* v. *Lombardozzi*. A copy is hereto annexed as Exhibit A. The Court of Appeals wrote no opinion, but merely a memorandum citing *Knapp* v. *Schweitzer*, 357 U. S. 371. That has not yet been reported, either officially or unofficially. A copy is hereto annexed as Exhibit B.

Its final order, or remittitur was amended on April 9, 1959 (N. Y. L. Journal, April 13, 1959, p. 12) to read:

> "Upon the appeals herein on behalf of the appellants there were presented and necessarily passed upon the following questions, viz. 1. Whether the procedure whereby the appellants were committed violated the due process clause of the Fourteenth Amendment to the United States Constitution; 2. Whether the privileges and rights of the appellants not to be compelled to incriminate themselves under

the Fifth Amendment to the United States Constitution, were improperly infringed; and 3. Whether the over-all effects of the proceedings violated the due process clause of the Fourteenth Amendment to the United States Constitution and the Fifth and Eighth Amendments of the United States Constitution. This court held that the rights and privileges of these appellants under the United States Constitution were not infringed or violated."

This has not yet been reported, either officially or unofficially.

(b) Grounds of Jurisdiction

(i) The proceeding was instituted by appellee pursuant to Section 406 of the Civil Practice Act of the State of New York to commit appellant (with others) to jail until he shall have answered various questions before appellee. Appellee was authorized to act under Chapter 989 of the Laws of 1958 of New York (Unconsolidated Laws § 7051 ff.). Copies of both statutes, so far as here relevant, are annexed as Exhibit C.

(ii) The final order of the Court of Appeals was made and entered on March 13, 1959. No application was made for rehearing. The notice of appeal was filed on April 10, 1959 with the Clerk of the County of New York, with whom all papers in this proceeding have been filed.

(iii) The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257(2).

(iv) Cases believed to sustain the jurisdiction are: *Young* v. *California*, 308 U. S. 147; *Kunz* v. *New York*, 340 U. S. 290; *Adler* v. *Board of Education*, 342 U. S. 485; *Slochower* v. *Board of Higher Education*, 350 U. S. 551.

(v) The state statutes involved are New York Civil Practice Act, Section 406, and New York Laws of 1958, Chapter 989, particularly Section 7. These are set out verbatim in Exhibit C.

(c) Questions Presented

1. Are Section 406 of the Civil Practice Act of the State of New York and Section 7 of Chapter 989 of the Laws of 1958 of the State of New York unconstitutional as applied to appellant because they deny him due process of law in violation of the Fourteenth Amendment to the United States Constitution, in view of the requirement of said Chapter 989 that the state authorities cooperate with federal authorities and of the fact that appellant had been subpoenaed by a committee of the United States Senate and was under investigation by agencies of the federal government, and had been subpoenaed by a federal grand jury.

2. Are Section 406 of the Civil Practice Act of the State of New York and Section 7 of Chapter 989 of the Laws of 1958 of the State of New York unconstitutional as applied to appellant because they abridge a privilege granted to him, a citizen of the United States, by the United States Constitution in violation of the Fourteenth Amendment to the United States Constitution, in view of the requirement of said Chapter 989 that the state authorities cooperate with federal authorities and of the fact that appellant had been subpoenaed by a committee of the United States Senate and was under investigation by agencies of the federal government, and had been subpoenaed by a federal grand jury.

3. Are Section 406 of the Civil Practice Act of the State of New York and Section 7 of Chapter 989 of the Laws of 1958 of the State of New York unconstitutional as applied to appellant because they abridge a privilege guaranteed to him by the Fifth Amendment to the United States Constitution, in view of the requirement of said Chapter 989 that the state authorities cooperate with federal authorities and of the fact that appellant had been subpoenaed by a committee of the United States Senate and was under investigation by agencies of the federal government, and had been subpoenaed by a federal grand jury.

(d) Statement of the Case

Appellant is one of a number of persons called before appellee, the Commission of Investigation of the State of New York, to answer questions concerning a gathering at the home of one Barbara at Apalachin, New York, in November 1957.

Appellee was created by Chapter 989 of the Laws of the State of New York. It was directed in Section 2(5) to "cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state". By Section 2(7) it was directed to refer to the appropriate official any evidence of crime discovered by it. Section 7, the crucial section here, authorized the Commission to grant any witness immunity in accordance with Penal Law § 2447. The relevant portions of the latter statute are al[illegible]t forth in Exhibit C.

When appellant was questioned he pleaded his privilege against self-incrimination with respect to a series of questions (R. 164-170).* The Commission then voted to grant him immunity (R. 170, 171). His counsel then made a statement which challenged the authority of the Commission to grant immunity on various grounds not here relevant (R. 172, 173) and on the ground that the immunity granted could not afford protection against federal prosecution (R. 174, 175). Counsel then called attention to the fact that appellant had been served with a subpoena to appear before a committee of the Senate (the McClellan Committee) and that an investigator for that committee was in the hearing room. Counsel inquired whether there had been correspondence between the Commission and any agency of the federal government, but his inquiry was not answered (R. 178).

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* The references are to the pages of the certified record in *Miranda* v. *Commission*, No. 893, October 1958 Term.

When the questions were again put to appellant he amplified his previous refusal by specific reference to the possibility of federal prosecution and the cooperation with federal agencies required of the Commission, pointing out that he was under investigation by a federal grand jury and the Department of Justice, as well as the Senate Committee (R. 179). He particularly referred to the fifth and Fourteenth Amendments to the Constitution of the United States (R. 180).

Thereupon the instant proceedings were instituted. At the hearing in the court of original jurisdiction appellant's counsel repeated the arguments previously made (R. 285-294) and added that appellant had appeared before a federal grand jury (R. 292). The court granted the application to commit at the end of the hearing (R. 294, 295).

The Appellate Division opinion expressly recognized that this question had been raised. It said that appellants claimed that the immunity conferred under this statute "was invalid since it does not protect them from subsequent prosecutions by federal authorities". It held further that this Court's decision in *Knapp* v. *Schweitzer*, 357 U. S. 371 was controlling (7 App. Div. 2d 56, 57, R. 339-341).

In the New York Court of Appeals appellant's counsel made the same contention in their brief. One of the headings of this brief states: "Point IV. The Privileges and Rights of the Appellants, under the Fifth Amendment to the Federal Constitution and the Provisions of Article I, Section 6, of the State Constitution, were Improperly Infringed" (Brief, p. 53). Subdivision B of that brief was headed "Imminence of Federal Prosecution Renders the Grant of Immunity Worthless" (Brief, p. 59). Counsel then argued: "We note that our contention is not that the New York immunity laws are unconstitutional *per se*, but that the application of those laws to the facts in the case before us is an unconstitutional one" (Brief, p. 59).

The Court of Appeals then affirmed, citing only the *Knapp* case (*infra*, p. 22).

(e) The Federal Question Raised is a Substantial One

This case presents the questions left open in *Knapp*, an aspect of which is now before this Court in *Mills* v. *Louisiana*, Nos. 74 and 75, recently argued. One is whether cooperation between state and federal law enforcement agencies precludes a state from compelling testimony which may disclose a federal offense when the state is powerless to grant immunity with respect thereto. And, if that question be not categorically negatived, the further question arises with respect to the extent and character of the cooperation which will preclude the state. Here the fact of cooperation appears from the command of the statute under which the state agency was empowered to act and under which the purported grant of immunity was made.

That the rulings of the state courts involved a consideration of those questions is apparent from the fact that in both appellate courts the order of commitment was expressly affirmed on the authority of *Knapp*. In the Appellate Division the precise point of cooperation was dealt with with the statement: "All of this presents a wide area for judicial discussion. This court, however, in the absence of the expression of a contrary view by the Supreme Court, is bound by the rule of law enunciated in *Dunham* v. *Ottinger*, 243 N. Y. 423, 438" (7 App. Div. 2d at 57).

There are, moreover, several substantial differences between this case and *Knapp*. In *Knapp* the inquiry clearly related to a state crime, to wit, bribery. Here no specific crime was involved and the Commission characterized its action in having appellant (and others) imprisoned as "a new and aggressive approach to underworld characters" and as having forced other "long entrenched underworld leaders to leave the State of New York" (N. Y. Leg. Doc. [1959] No. 102, pp. 13, 14).

Here the probability of federal prosecution is great since appellant was under subpoena by a Senate committee and a federal grand jury. It is not a "bare possibility" as contended by the state in *Knapp* (see brief in this Court, pp. 9-10, 11, 17, 18). And the New York Appellate Division took the same view: "it would not appear that there is a real and substantial danger that the testimony compelled by the State will be used in a subsequent Federal prosecution" (2 App. Div. 579, at 585).

That view was, no doubt, in large part motivated by the circumstance that in *Knapp* the witness had been called before a grand jury in a secret inquiry. There was nothing in the record to indicate that the secrecy of the grand jury proceeding would be violated. In the case at bar the proceedings before the Commission are public and, as one of the Commissioners stated: "This is an open hearing and we cannot control the activities of anybody who cares to come in to listen and that applies to any state or federal authorities if they wish to come in" (R. 176). It is therefore crystal clear that in the case at bar any evidence which appellant might give under the compulsion of the state statutes which might tend to incriminate him under federal law would become public property and would be available for use by any federal agency.

In conclusion we call the Court's attention to the fact that appellant is simultaneously submitting a certiorari petition which raises certain procedural due process points not available to him on this appeal.

Respectfully submitted,

OSMOND K. FRAENKEL,
Counsel for Appellant.

APPENDIX

Exhibit A

Bastow, J.:

We consider together appeals by seven respondents in separate proceedings seeking a review of orders made at Special Term. Procedural differences in disposing of the applications at Special Term require the preliminary statement that five respondents (Frank Valenti, Mancuso, Riccobono, Castellano and Miranda) appeal from orders made by Specter, J., and two respondents (Lombardozzi and Peter Valenti) appeal from orders by Tilzer, J.

In August, 1958, the appellants were served with subpoenas issued by the Commission of Investigation of the State of New York commanding them to appear at a public hearing being conducted by the Commission in New York City. At the first hearing on August 12, 1958 the chairman announced that the hearing was being held in connection with what is now known as the Apalachin meeting in November, 1957, at the residence of one Joseph Barbara in Tioga County. The purposes of the hearing were stated to be, among other things, "Whether crimes of conspiracy, violation of section 340 of the General Business Law which pertains to monopoly or restraint of trade statutes, bribery of public officials or any other crimes were committed or planned at this meeting." There followed individual hearings for each of the appellants commencing on August 12 and ending on August 19. Each was represented by one or more counsel at the hearings and in the subsequent court proceedings.

The pattern of the proceedings when each appellant appeared before the Commission was much the same. Each was asked a series of questions numbering between 30 and 40. Responsive answers to these questions would have been relevant to one of the subjects of the investigation as stated in each subpoena to be "the organization, purposes and

participants of, and discussions had and decisions made at" the Apalachin meeting. Other than identifying themselves, appellants refused to answer all questions. Such refusals were based on the privilege against self-incrimination and other grounds, most of which are presented upon this appeal and will be hereinafter considered.

Following the respective refusals to answer questions, the members of the Commission purporting to act under statutory authority (L. 1958, ch. 989, 7) voted to and did purport to confer immunity upon each appellant in accordance with section 2447 of the Penal Law. Each witness was then informed that he had immunity "from prosecution by the New York State authorities on account of any transaction, matter or thing of a criminal nature which may be revealed by your truthful and responsive answers to the particular questions which this Commission * * * may now direct you to answer." Thereafter, each appellant was asked some 26 questions which were among those previously propounded. Again each witness refused to answer the questions upon stated grounds. The direction was made that the questions be answered but each appellant persisted in his refusal.

We consider first the ensuing court proceedings relating to the five appellants who appeared before the Commission on August 12, 13 and 15. As to each, individual orders were obtained directing the named witness to show cause, either forthwith or upon the same day that he had testified, why a warrant should not issue for his apprehension and commitment forthwith to jail there to remain until he answered the questions. The show cause order was supported by an affidavit of the Commission chairman and a copy of the subpoena. Following a hearing in each case, and to which we shall advert subsequently, the applications were granted and warrants issued for the imprisonment of the five appellants until each answered the questions set forth in the warrant.

Exhibit A

The other two appellants were brought before Special Term the day after the Commission's hearing. In the interim, transcripts of the Commission's hearing were forwarded to the court and counsel. Upon request of these appellants an adjournment of two days was granted. At that time appellants produced certain witnesses and while they complain of erroneous rulings in the course of the examination of these witnesses, it does not appear from either record or briefs that they attack the validity of the court hearings upon the ground that there was a summary determination without an adequate hearing. At the conclusion of this combined hearing the applications were granted and similar warrants issued for the imprisonment of the witnesses.

It is against this background that we consider the various contentions of the appellants. It is claimed that the act (L. 1958, ch. 989) creating the respondent Commission is unconstitutional and in violation of the State constitutional provision (Art. V, §3). To place in focus this contention it is necesary to point out that section 2 of article V of the Constitution provides for nineteen civil departments in the state government. Section 3 then provides in part that "No new departments shall be created hereafter, but this shall not prevent the legislature from creating temporary commissions for special purposes * * *."

Turning to the enactment (L. 1958, ch. 989) under attack we find in section 1 the provision that "There is hereby created a temporary state commission of investigation." The four commissioners are to be appointed for a term of five years (§2) and the act is to remain in effect for five years (§13). Judged by any standards the commission is a temporary one and so at least one appellant concedes in his brief. It is unnecessary to recite in detail the functions, powers and duties set forth in the eleven subdivisions of section 2 of the act. We construe them as being "special purposes" within the meaning of the language set forth

in the exception to the constitutional prohibition against the creating of new state civil departments.

One of the landmark decisions construing this constitutional provision is *Matter of People* (*Westchester Title & Trust Co.*), 268 N. Y. 432. There it was held that an act creating a Mortgage Commission and transferring to it the powers vested in the Superintendent of Insurance to control and administer mortgage investments of guarantee companies came within the plain intendment of the constitutional provision. The court placed emphasis upon the abnormal if not emergency conditions that existed. The court stated (p. 443) that such conditions "call for prompt action and, in the opinion of the Legislature, no department is now equipped for such action. The Commission is created for the special purpose of prompt and effective action during the period when there is special need for prompt and effective action by a public agency properly equipped for that purpose."

In *Matter of Di Brizzi* (*Proskauer*), 303 N. Y. 206, the court passed upon the right of the Governor and Attorney General to create by joint action a State Crime Commission under the provisions of subdivision 8 of section 62 of the Executive Law. In upholding the validity of the action it was said (p. 216) that "This is a *general* investigation into *organized* crime and its relation to government. As an incident thereto, it may be that the existence of specific, individual crimes will be uncovered, but that will merely be collateral and subordinate to the main object of inquiry. The purpose of the investigation is to secure information to guide executive action, not to indict or punish any individuals." The statute under consideration authorizes similar general investigations for the guidance of both the executive and the legislature. Pursuant to its legislative power (Constitution, Art. III, 1) the legislature was vested with power to enact the statute and we conclude that it was not violative of section 3 of Article V.

Exhibit A

The appellants make various attacks upon the immunity conferred upon them by the Commission. Section 7 of the enactment (L. 1958, ch. 989) provides in substance that in any investigation or hearing conducted by the Commission, relating to any crime with respect to which, by express statutory provision, a competent authority is authorized to confer immunity, such may be conferred by the Commission in accordance with the provisions of section 2447 of the Penal Law, "* * *" but only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect to any objections which they may have to the granting of such immunity." Without attempting to consider seriatim the contentions of the several appellants we state our views that lead to the conclusion that immunity was properly conferred upon each appellant.

The Commission, as has been noted, placed upon the record that it was investigating, among other things, whether the crimes of conspiracy or bribery of public officials had been committed. (Penal Law §§378, 580.) By express statutory authority (Penal Law §§381, 584) certain named officials and bodies are authorized to confer immunity in accordance with section 2447 of the Penal Law. The act under consideration extended this authority to the Commission. At the hearings each appellant was carefully informed of such grant and the extent of the immunity flowing therefrom. This is found in subdivision 2 of section 2447 where it is stated that "immunity", as used therein, "means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceedings." The immunity so conferred was not limited to the crimes the Commission had stated it was

investigating. It was complete immunity whether the answers given might involve the witness in the crimes of bribery or conspiracy or any other crime provided, of course, that the answers were truthful and responsive to the questions. Thus, appellants received immunity coextensive with their privilege against self-incrimination. (N. Y. Constitution Art. I, §6.)

Appellants further contend the proffered immunity was worthless since the facts were not disclosed regarding communications between Commission, the attorney-general of the State, and various district attorneys. As indicated above, Section 7 of the act creating the respondent (L. 1958, ch. 989) provides that its right to confer immunity is to be exercised only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect of any objections which they may have to such grant of immunity. In passing it might be noted that a similar provision is found in section 2447 (subd. 3, par. [d]) of the Penal Law. This section was enacted as a result of recommendations filed by the New York State Crime Commission in 1953. (See Third Report of the Commission Leg. Doc. No. 68 [1953] pp. 14-16). After recommending therein that the power to grant immunity be given to a "competent authority" which was defined, among other things, as "a majority of a legislative * * * commission", it was said (p. 16): "The legislation might also provide that any official or official group, other than a court, authorized to grant immunity, before so doing should as a matter of course consult with the appropriate district attorney."

When requested in these proceedings, the Commission informed each appellant that it had afforded the attorney-general and the appropriate district attorney an opportunity to be heard in compliance with section 7 but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive

power was exercised by the Commission, as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to induce the Commission to withhold the granting of such immunity for reasons advanced, which might have been unknown or overlooked by the Commission. But the opportunity to be heard was not a restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the Commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the Commission, individually, or as a body, could not detract from the immunity already granted. Thus, in stating that the attorney-general and appropriate district attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the Commission if it fails to comply with the requirements of the statute.

Lastly, upon this subject, the appellants claim that the immunity so conferred was invalid since it does not protect them from subsequent prosecutions by Federal authorities. This question has been recently passed upon by this court in *People* v. *Costello*, 6 A. D. 2d 385, in the light of *Knapp* v. *Schweitzer*, 357 U. S. 371. In the *Costello* case we said that "Although the potential exposure to Federal prosecution asserted by appellant seems reasonable enough, since the Federal government might form an interest in the answer which he could give concerning the written notations on the paper found in his pocket, this exposure is not a ground for excusing the answers where the immunity which flows from State law is as adequate as the State can make it against its own subsequent prosecution. (*Dunham* v. *Ottinger*, 243 N. Y. 423.) This rule is not, of course, open to re-examina-

tion here. (Cf. dissenting opinions by Black and Douglass, JJ., in *Knapp* v. *Schweitzer*, *supra*, p. 383.)"

The appellants, however, renew their claims as to the inadequacy of the conferred immunity upon the ground that one of the functions of the Commission is to "cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state." (L. 1958, ch. 989, § 2, par. 5.) This does not alter our opinion as expressed in the *Costello* case. As we understand the *Knapp* case the crucial holding was that the sole "purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." (357 U. S. 371, 380.) It has been heretofore found that the State conferred upon appellants complete immunity. It is unnecessary for this court to speculate as to what the effect of this might be in the event of subsequent Federal prosecution under circumstances here open only to conjecture. The test is whether the immunity gives protection against State prosecution— "* * * all that the State is required to or can do is to give immunity against its own processes and, if it has done that, as this statute does it, it has satisfied the requirements of the Constitution." (*Dunham* v. *Ottinger*, 243 N. Y. 423, 438.)

In sum, every person owes a duty to the State to testify when called before a duly constituted authority. However, he may not be compelled to testify when he claims his privilege against self-incrimination. But that privilege disappears when the State removes any danger of criminal prosecution—based on any testimony he may give—by granting immunity securing the witness against such prosecution. Hence, when immunity is properly tendered to a witness claiming his constitutional privilege, he must answer or suffer the consequences of his contumacy. The

object of the constitutional privilege is fully accomplished when immunity is granted.

We recognize that in *Knapp* v. *Schweitzer*, *supra*, the court posed but left unanswered the question as to whether in the case of collaboration between state and federal officials, a defendant might successfully assert his privilege in the state proceeding. Moreover, it is suggested therein that evidence so obtained might be excluded in a federal prosecution. This suggestion is re-enforced by the views expressed by some of the Justices in separate opinions that the rule enunciated in *Feldman* v. *United States*, 322 U. S. 487, should be reconsidered. All of this presents a wide area for judicial discussion. This court, however, in the absence of the expression of a contrary view by the Supreme Court, is bound by the rule of law enunciated in *Dunham* v. *Ottinger*, *supra* (243 N. Y. 423, 438). There, as heretofore stated, it was held that the State is only required to give immunity against its own processes and when that is done the Constitutional requirements have been satisfied.

Finally, the appellants contend that the Commission pursued the wrong remedy in bringing these proceedings pursuant to section 406 of the Civil Practice Act. Moreover, they claim that if the section is applicable the proceedings at Special Term were conducted in such a manner as to be violative of the due process clauses of the state and federal constitutions. The appellants argue that the witnesses, if they are in contempt, may only be prosecuted in a criminal proceeding concerning such contempt (Judiciary Law, § 750). Section 406 provides, in substance, that when a witness, such as these appellants, attending before a body, such as respondent, "refuses without reasonable cause * * * to answer a legal and pertinent question * * * the person issuing the subpoena, if he is a judge of a court of record, or not of record may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there

to remain until he submits to do the act which he was so required to do or is discharged according to law." The distinction between this section and the provisions of the Judiciary Law (Art. 19) is that the latter are punitive in nature whereas section 406 is coercive alone. (Cf. *Matter of Delehanty* [*Sullivan*], 202 Misc. 33, affd 280 App. Div. 542, affd 304 N. Y. 725.)

In *Matter of Barnes*, 204 N. Y. 108, the court considered a like provision then found in section 856 of the Code of Civil Procedure. Judge Gray wrote (p. 113) that "This statute is, and always has been, a valuable instrumentality in the administration of justice and the enforcement of laws." We find no authority that required the Commission to proceed to invoke the punitive provisions of a criminal contempt as distinguished from its applications for coercive relief to compel the witnesses to testify.

A more troublesome question is presented as to whether appellants were accorded due process in connection with the court proceedings on August 12, 13 and 15. In *Matter of Barnes, supra*, one of the questions before the court was whether a summary conviction under the predecessor section violated a constitutional right. Some of the members of the court were of the opinion (1) that a summary conviction without notice violated no constitutional right and (2) that even if notice were necessary, the court could read into the section a provision requiring notice to be given. A majority of the court, however, while disagreeing with the first proposition held (p. 122) that the language of the section "may be so construed as to require notice to one charged with the contempt, and that when read in connection with the provisions of the Judiciary Law relating to criminal contempts, the question is removed from the realm of doubt."

In these proceedings there can be no question that notice was given in the form of show cause orders based upon an affidavit made by the chairman of the Commission setting forth in some detail service of the subpoena and the ensuing

proceedings before the Commission. A transcript of the testimony in each proceeding was made available to the court and counsel for the witness. The disturbing feature of the proceeding is what took place in Special Term in connection with five of these appellants. As had been stated heretofore, these witnesses were brought before Special Term on the same day each had been called to testify. All requests for adjournments were denied. There was, however, a hearing and counsel for each appellant advanced in various ways many of the same contentions that are presented to this court and discussed herein. A careful reading of the record of the five proceedings discloses that, in substance, each counsel requested additional time to submit a brief or examine the law. Counsel was of the opinion that there were many intricate questions of law that should be explored. The court was of the opinion that the legal questions were simple and should be passed upon at once. We do not find any request for an adjournment to enable appellants to produce evidence either documentary or by witness. The precipitate haste with which the proceedings were conducted does not meet with our approval. However, the ultimate question is whether there was any prejudice to appellants amounting to a denial of due process because they were denied adjournments so their counsel could examine the law and submit briefs. After the passing of weeks we have examined the same questions, together with others advanced by appellants, and determine that Special Term was correct in its legal decisions and in the action taken.

The contentions of the remaining two appellants that they were not accorded due process are without substance. As to them, adjournments were granted when counsel stated that they desired to submit proof. Subsequently, witnesses were called in an attempt to prove cooperation between state and federal law enforcement agencies as bearing upon the completeness of the granted immunity. What has here-

tofore been written upon this subject makes it clear that such testimony was irrelevant and properly excluded. The same conclusion is reached as to the court's rulings excluding testimony relating to the notice given by the Commission to other state prosecutors before conferring immunity.

It has been said that "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. * * * Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." (*Dohany* v. *Rogers*, 281 U. S. 362, 369.) When the contentions of appellants are considered in the light of this legal principle it cannot be found that there was any denial of due process. They received reasonable notice. Some had been subpoenaed two weeks before the date of their appearance. Each was represented by counsel and after complete immunity had been granted each persisted in his refusal to testify.

Thereupon, they were brought before Special Term in proceedings instituted pursuant to section 406 of the Civil Practice Act. The burden then placed upon appellants to justify their refusal to answer the questions was the establishment by them of a sufficient cause for which a reason could be and was given. The reasons so advanced consisted of legal contentions that the creation of the Commission was unconstitutional and that the immunity conferred was either defectively accomplished or not adequate to protect them from subsequent prosecution. After hearings Special Term found that no reasonable cause had been shown by appellants for their refusals to answer the questions. The decisions were properly made pursuant to section 406 after hearings that met the requirements of due process.

The orders appealed from should be affirmed.

All Concur.

Exhibit B

COURT OF APPEALS

OF THE STATE OF NEW YORK

In the Matter

of

The Application of the COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Petitioner-Respondent,

To Commit

FRANK JOSEPH VALENTI, ROSARIO MANCUSO, JOSEPH RICCOBONO, PAUL CASTELLANO and MICHELE MIRANDA,

Respondents-Appellants,

to Jail, Pursuant to Section 406 of the Civil Practice Act.

BE IT REMEMBERED that on the 15th day of January in the year of our Lord one thousand nine hundred fifty-nine, FRANK JOSEPH VALENTI, & ors., the appellants in this case, came here into the Court of Appeals, by Gilbert S. Rosenthal, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the First Judicial Department, and the Commission of Investigation of the State of New York, by Miles J. Lane, Chairman, & ors., Commissioners, the respondent in said cause, afterwards appeared in said Court of Appeals by Eliot H. Lumbard, its attorney,

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Exhibit B

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Harris B. Steinberg, of counsel for the appellants, Castellano and Miranda, and by Mr. Gilbert S. Rosenthal, of counsel for appellant Valenti, submitted by the remaining appellants and argued by Messrs. Eliot H. Lumbard and Nathan Skolnik, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from be and the same hereby are affirmed (*Knapp* v. *Schweitzer*, 357 U. S. 371, 380-381).

AND it was also further ordered, that the records aforesaid and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon accordingly.

THEREFORE, it is considered that the said orders be affirmed, etc., as aforesaid.

AND hereupon, as well as the Notices of Appeal and return thereto aforesaid, as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York
Court of Appeals, Clerk's Office
Albany, March 13, 1959

Exhibit C

New York Civil Practice Act

"§ 406. Subpoena Issued by Judge, Arbitrator, Referee or Other Persons, in Certain Cases.

(Clavenger's Practice Manual, 1958 ed., p. 4-63)

1. When a judge, or an arbitrator, referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the same manner as prescribed for a service of a subpoena issued out of a court of record. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

2. A person who is duly subpoenaed, as prescribed in the last subdivision, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered in the same manner as prescribed in the case of a person failing to obey a sub-

poena issued out of a court of record. If he fails to attend, the person issuing the subpoena, if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness and bring him before the officer, person or body before whom or which his attendance was required.

3. If the person subpoenaed and attending or brought as prescribed in the last subdivision before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

4. A warrant of commitment, issued as prescribed in the last subdivision, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

5. A warrant to apprehend or commit a person, issued as prescribed in this section, must be directed to the sheriff of the county where the person is, and must be executed by him in the same manner as a similar mandate issued by a court of record in an action."

Exhibit C

New York Laws of 1958, Chapter 989

(McKinney's Consolidated Laws, Book 65, Part 2
1958-59 Supplement pp. 75-77)

"Section 2. Functions, powers and duties of the commission. The commission shall have the following functions, powers and duties:

1. The commission shall have the duty and power to conduct investigations in connection with:

(a) The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;

(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

(c) Any matter concerning the public peace, public safety and public justice.

• • •

5. The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

• • •

7. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer."

"Section 7. Immunity from prosecution.

In any investigation or hearing conducted by the commission pursuant to this article, relating to any crime or offense with respect to which, by express provision of statute, a competent authority is authorized to confer im-

munity, the commission may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of the penal law, but only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect to any objections which they may have to the granting of such immunity."

New York Penal Law

"SECTION 2447. WITNESSES' IMMUNITY:

(McKinney's Consolidated Laws, Book 39, Part 2, 1958-59 Supplement, p. 211)

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity; if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided herein.

2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order of competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subject to penalty or forfeiture for any perjury or contempt committed in answering or failing to answer or in producing or in failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt." • • •

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Supreme Court, U.S.
FILED
JUN 22 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] ?

PAUL CASTELLANO,

Appellant,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

ELIOT H. LUMBARD,
Chief Counsel, Commission of Investigation,
Attorney for Appellee,
270 Broadway,
New York 7, N. Y.

NATHAN SKOLNIK,
Deputy Commissioner,

ARNOLD M. WEISS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 939

PAUL CASTELLANO,

Appellant,

—against—

THE COMMISSIONER OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A SARACHAN, Commissioners,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This is a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss an appeal from an order of the New York Court of Appeals, entered March 13, 1959, which unanimously affirmed, without opinion, an order of the Appellate Division of the Supreme Court, First Department, entered on Decem-

ber 9, 1958 (961).* That Court in turn had unanimously affirmed, with an opinion by Bastow, *J.* (985, *et seq.*; and see Jurisdictional Statement, Appendix, page 9), an order of the Supreme Court of New York County, entered August 27, 1958 (52-1). The order granted an application by the Commission of Investigation of the State of New York for a warrant, pursuant to the authority of Section 406, New York Civil Practice Act, committing appellant to jail for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting," which had been held in New York at Apalachin, Tioga County. On April 9, 1959, the Court of Appeals amended its remittitur upon appellant's application so as to define the precise questions considered (Jurisdictional Statement, page 1).

Six other recalcitrant witnesses were incarcerated under identical orders and warrants for their similar refusals to testify during the same hearing in August 1958. In the New York courts the appeals of all seven were consolidated. Appellant and all but one of the seven so committed are presently confined to the Civil Jail of New York County.

Appellant here, in addition to filing this appeal has also filed a petition for a writ of certiorari to review the same New York Court of Appeals decision affirming his incarceration. An application by appellant for bail pending this appeal was denied by Mr. Justice Harlan on May 4, 1959. As of this date, Michele Miranda and Joseph Riccobono, two of the other six persons so incarcerated, separately have petitioned this Court for writs of certiorari to the New

* Numerals in parentheses refer to folio numbers in the consolidated record on appeal.

York Court of Appeals to review their commitments; Miranda's Petition was docketed on May 5, Riccobono's was filed on May 20. Another recalcitrant witness, Rosario Mancuso, separately has instituted an appeal to this Court from the decision of the New York Court of Appeals.

The opinion of the Appellate Division on the consolidated appeal is reported as *Commission of Investigation* v. *Lombardozzi, et al.*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959).

The Commission.

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York, Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York Crime Commission in 1953 were closely followed by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administration of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.
>
> "This is not a novel recommendation. One of the model statutes suggested by the Drafting

> Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities.' The American Bar Association has made a similar recommendation." *First Report of the New York State Crime Commission*, Leg. Doc. No. 23 (1953), pp. 27-30.

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

> "Section 2(1)(a) The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering;*
>
> "(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;
>
> "(c) Any matter concerning the public peace, public safety and public justice." (Italics added.)

The Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions and statutes are set forth in the Appendix to the Petition at page 26, *et seq.*

The Facts

The Apalachin Meeting.

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who reside in

various sections of this country and abroad. Appellant and the six persons similarly incarcerated are New York residents and were among this group.

Over 62 persons have been identified publicly as attending the meeting, which has come to be referred to as the "Apalachin Meeting." Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activities of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location—indicates extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings.

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for these purposes commenced in the Criminal Courts Building, New York County, on August 12, 1958 (130, *et seq.*). The subpoenas by which appellant and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not limited

to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara on or about November 14, 1957, at Apalachin, Tioga County, State of New York.*" (e.g. 96) (Italics added.)

At the outset of the hearings the Chairman of the Commission read an opening statement to the assembled witnesses and their counsel which set forth the purposes of the hearing in considerable detail (133, *et seq.*). It was repeated and referred to on various occasions to individual witnesses including appellant (191, 282, 382, 478, 588). The statement read, in part, as follows:

"*In our investigation and through this hearing we aim to ascertain who organized the Apalachin meeting on November 13th and 14th, 1957, the persons who attended, the purpose or purposes, what occurred, what actions were taken and what decisions were made.*

"We intend to find out whether the crimes of conspiracy, violation of Section 340 of the General Business Law, which pertains to monopoly or restraint of trade statutes, bribery of public officials or any other crimes, were committed or planned at this meeting.

"Moreover, it is our purpose to determine if changes in the law are necessary and, if so, to recommend such measures to the legislature." (Italics added.)

As part of his opening statement the Chairman introduced a copy of the Commission's resolution

authorizing these public hearings. The resolution, marked as Commission's Exhibit 1, again set forth the purpose and subject matter of the investigation (597).

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Appellant's Conduct Before the Commission

An individual hearing was held for appellant before the Commission. A similar pattern of events occurred regarding appellant and the other witnesses during their respective Commission hearings.

Each was represented by one or more counsel throughout the Commission and subsequent court proceedings (e.g., 477; 851).

Questions were directed to appellant by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin Meeting (490-504). Other than merely identifying himself (490), appellant refused to answer these questions (492-504). His refusals were based on his privilege against self-incrimination (493, *et seq.*).

In every instance the Commission, acting under the authority of Section 7 of its Act and in accordance with Section 2447 of the New York Penal Law, thereupon voted to confer and did confer immunity upon appellant and the others (510-513). The Commission's action and the effect of its decision regarding immunity were clearly explained to appellant, as well

as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission (513-516).

After this instruction the same questions were repeated by the Commission (535-569). As did the others, appellant again refused to make any answer on the basis of several alleged grounds, including the privilege against self-incrimination contained in both the New York and United States Constitutions (535-538).

On behalf of the Commission the Chairman then specifically directed and ordered appellant to answer the questions as they were put to him (539, *et seq.*). Appellant nevertheless persisted in his refusal to answer (540, *et seq.*).

After appellant had followed the aforementioned pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings (570-572).

The Hearings in the Trial Court

After appellant's separate hearing was adjourned by the Commission, pending further proceedings, an order was obtained and served personally on appellant directing him to appear before the New York Supreme Court, New York County, to show cause why a warrant of commitment should not issue against him pursuant to Section 406, Civil Practice Act, for his refusal to answer the Commission's questions.

Appellant was the fourth recalcitrant to appear before Mr. Justice Spector, then sitting in the motion part of the trial court, to explain his refusal to testify. Two other witnesses were heard and committed on August 12. Appellant and the third recalcitrant witness were heard and committed on August 13.

The trial court offered appellant full opportunity to explain why he had refused to testify. Appellant's counsel took complete advantage of this opportunity and made extensive argument and factual representations (847-885). Furthermore, each of the three witnesses who preceded appellant had raised the same legal objections that appellant raised, and now raises, and the same judge who committed appellant had heard and passed upon these arguments (682-750, 751-792, 793-846).

Before appellant's judicial hearing, the minutes of the Commission hearing had been transcribed and made available to both the Court and counsel. The Court stated its findings were based on a study of the transcript (882-884), which was very short and easily understood. After full argument as described above, the Commission's application was granted by the Court (884), and the warrants executed.

* * * *

Since his commitment, appellant has been confined continuously to the Civil Jail of New York County under the custody of the Sheriff of the City of New York.

At no time, before or during the hearings of the Commission and the Court, or to the present, has appellant given any indication of a desire to answer the

Commission's questions. Upon truthfully and responsively answering the questions put to him, appellant may secure his release pursuant to law (e.g. 52-1 [order], and 115 [warrant]).

Questions Presented

1. Has appellant clearly shown that in the New York courts he challenged a New York statute as being repugnant to a provision of the United States Constitution, treaty or law, so as to provide ground for mandatory jurisdiction pursuant to the provisions of Title 28, United States Code, Section 1257(2)?

2. Does the duty of a state law enforcement agency to apprise federal law enforcement authorities of such violations of federal law as it discovers in the course of its investigations thereby convert the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution, a prohibition against action by the national government only, into a prohibition against action by the state government, after immunity has been conferred by the state upon petitioner?

3. Does either the due process clause or the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution incorporate the Fifth Amendment so as to make the Fifth Amendment applicable to states and state proceedings?

POINT I

Appellant has failed to meet the jurisdictional requirements of Title 28 United States Code, Section 1257(2).

Appeal to this Court as a matter of right is based upon Title 28 United States Code, Section 1257(2), which reads, in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

This section has been strictly construed to reject asserted jurisdiction in the absence of a clear and explicit demonstration by the appellant that in the state courts he challenged the validity of a state statute as being repugnant to the United Constitution, treaties or laws; that the state courts passed upon such challenge of repugnance; that the state courts rejected the challenge of repugnance and ruled in favor of validity of the statute. *Charlestown Federal Savings & Loan Assoc.* v. *Alderson*, 324 U. S. 182 (1945); *Jett Bros. Distilling Co.* v. *City of Carrollton*, 252 U. S. 1 (1920); *Mergenthaler Linotype Co.* v. *Davis, et al.*, 251 U. S. 256 (1920).

Jurisdiction under Title 28 United States Code, Section 1257(3) (certiorari) requires only alleged denial by the state courts of an asserted federal right, as contrasted with the strict requirements of Section 1257(2) for appeal as of right; a prior challenge of a state statute as repugnant to federal law is unnecessary under Section 1257(3).

In a strained effort to obtain jurisdiction under Section 1257(2), the appellant now alleges for the first time that he had previously challenged Section 7 of the Commission's enabling act as being repugnant to the federal privilege against self-incrimination. This allegation is unfounded.

Section 7 of the Act creating the Commission authorizes the Commission to confer immunity from prosecution in New York. All that Section 7 ever purported to do was to negate the New York privilege against self-incrimination. The New York Court of Appeals held Section 7 did just that. *Commission of Investigation* v. *Lombardozzi*, 5 N. Y. 2d 1026 (1959). But Section 7 never even purported to negate the federal privilege and, therefore, was not challenged on this basis. The Court of Appeals merely held, as interpretation of the United States Constitution, the Commission's authority to cooperate with federal authorities did not make the the Fifth Amendment applicable to state proceedings. This decision in no way involved or required the assistance of Section 7. Nor was the constitutionality of that section, as against federal law, questioned.

Appellant further alleges Section 406 of the New York Civil Practice Act was challenged below as re-

pugnant to the federal privilege against self-incrimination. This allegation is completely unfounded. Throughout the entire proceedings, all witnesses including appellant conceded the constitutionally of Section 406. All recognized in their briefs and arguments that long before the present proceedings, the New York Court of Appeals had read the requirements of notice and hearing into Section 406, thereby placing that section four-square within the standards of due process. *Matter of Barnes*, 204 N. Y. 108, 97 N. E. 508 (1912). The constitutionality of Section 406 being conceded, the only question raised was whether, on the facts of this case, Section 406 had been followed and due process thereby accorded. The state courts Section 406 was followed and due process thereby afforded.

Appellant's attempt to gain jurisdiction under Section 1257(2) is an unfounded afterthought. Appellant's two state court briefs on appeal are barren of the requisite challenge of repugnance. In fact, the very sentence in his brief to the Court of Appeals to which he points in an effort to demonstrate such a challenge indicates the absence of the challenge or the constitutional basis for an alleged challenge:

> "We note that our contention is not that the New York immunity laws are unconstitutional *per se*, but that the application of those laws to the facts in the case before us is an unconstitutional one." (Jurisdictional statement, p. 5)

At best this is an ambiguous challenge of repugnance. It is in no sense the clear and explicit challenge required under Section 1257(2). Neither the original nor the amended remittitur of the Court of Appeals gives any indication that such a challenge was made or passed upon. (See Jurisdictional Statement, pp. 1-2).

POINT II

Appellant's rights against compulsory self-incrimination guaranteed by the United States Constitution were not infringed and cannot be prejudiced by this state proceeding.

Appellant's contention that he was improperly deprived of his rights against compulsory self-incrimination is similar to an argument raised by Michele Miranda in a companion case. (*Miranda* v. *Commission of Investigation*, October Term, 1958, No. 893). The Commission's response (Point I of its Brief) to that argument is applicable to appellant's contention; in the interest of brevity it is not repeated here. The only nuance in appellant's argument—that the alleged deprivation violated his rights under both the due process and privileges and immunities clauses of the Fourteenth Amendment, as well as the self-incrimination provision of the Fifth Amendment—also is adequately considered in the Commission's response to Miranda.

Subsequent to preparation of the Commission's brief in Miranda, this Court decided *Mills* v. *Louisiana*, 27 U. S. L. W. 4420 (June 8, 1959). Appellant stated that "[his] case presents the questions left open in *Knapp* [*Knapp* v. *Schweitzer*, 357 U. S. 371 (1958)], an aspect of which is now before this Court in *Mills* v. *Louisiana*, Nos. 74-75, recently argued." Needless to say, appellant's contentions crumbled with this Court's decision in *Mills*. That decision gives full support to the Commission's position.

The facts in *Mills* were stipulated. The cooperation there admitted was significant and was an accomplished fact. It did not consist merely of a statutory duty or authority to cooperate, the most that appellant may to demonstrate here.

Moreover, the danger of federal prosecution in *Mills* was imminent. Indictments for persons implicated already had been returned. A grand scale federal investigation by the United States Attorney for the Eastern District of Louisiana, and the Internal Revenue Service, was in full swing. And as Mr. Chief Justice Warren noted in his dissenting opinion: "Doubt which might have existed concerning federal interest in petitioners' possible tax evasions was removed when petitioners were induced to waive the statute of limitations for relevant tax years" (27 U. S. L. W. at 4421).

This Court held neither of these factors converted the Fifth Amendment into a prohibition against the states or state action in enforcement of its fundamental police powers.

CONCLUSION

Appellant has failed to satisfy the jurisdictional requirements of Title 28, United States Code, Section 1257(2) and the appeal should therefore be dismissed. The federal question raised is insubstantial, and the appeal must be dismissed in any event.

Respectfully submitted,

ELIOT H. LUMBARD,
Chief Counsel, Commission of Investigation,
Attorney for Appellee,
270 Broadway,
New York 7, N. Y.

NATHAN SKOLNIK,
Deputy Commissioner,

ARNOLD M. WEISS,
Assistant Counsel,

Of Counsel.

FILE COPY

MOTION FILED SEP 4 1959

MOTION FOR LEAVE TO FILE
SUPPLEMENT TO THE MOTION
TO DISMISS AND TO
SUPPLEMENT THE MOTION
TO DISMISS

FILE COPY
MOTION FILED SEP 4 1959

Supreme Court of the United States

OCTOBER TERM, 1959

No. 72

PAUL CASTELLANO,

Appellant,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE A SUPPLEMENT TO THE MOTION TO DISMISS
and
A SUPPLEMENT TO THE MOTION TO DISMISS

ELIOT H. LUMBARD,
Chief Counsel, Commission of Investigation,
Attorney for Appellee,
270 Broadway,
New York 7, N. Y.

NATHAN SKOLNIK,
Deputy Commissioner,

ARNOLD M. WEISS,
Assistant Counsel,

Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1959

No. 72

PAUL CASTELLANO,

Appellant,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE A SUPPLEMENT TO THE MOTION TO DISMISS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement

This is a motion for leave to file a supplement to a prior motion filed pursuant to Rule 16 of the Revised Rules of this Court to dismiss an appeal from an

order of the New York Court of Appeals, entered March 13, 1959. Appellant's Jurisdictional Statement was filed with this Court on May 22, 1959 and assigned Docket No. 939 for the October Term of 1958. The Commission of Investigation, appellee, filed a Motion to Dismiss on June 22, 1959. This proceeding has been carried forward as No. 72 for the October Term, 1959. A companion petition for a writ of certiorari was denied on June 29, 1959. (No. 940, October Term, 1958.)

Appellant had been committed to Civil Jail in New York County, State of New York, until he answered certain questions put to him by the Commission of Investigation during public hearings concerned with the so-called "Apalachin Meeting" held on the premises of Joseph Barbara in Apalachin, Tioga County, New York, on November 14, 1957. His appeal to this Court was predicated upon his alleged legal right to refuse to make any responses whatsoever to those questions, particularly on the claimed ground of privilege against self-incrimination. Appellant had been granted immunity by the Commission of Investigation pursuant to state law. All New York courts which considered the questions he raised in those courts ruled unanimously against him.

Subsequent to the docketing of his appeal in this Court and the filing of the Commission's Motion to Dismiss, however, appellant requested a hearing to testify and give evidence in response to such inquiries as the Commission might direct to him. On July 21, 1959 at a public hearing of the Commission of Investigation held in the Criminal Courts Building,

New York, New York, appellant did so testify and make responses to the Commission's inquiries.

Leave of this Court to file a supplement to the Commission's motion to dismiss, therefore, is respectfully requested by the appellee. The basis for this application is the new factual development which renders moot appellant's claims.

SUPPLEMENT TO THE MOTION TO DISMISS

This appeal is moot for appellant has appeared and testified in complete contradiction of the legal theory upon which his appeal is predicated.

As the aforementioned statement indicates, appellant no longer desires to stand upon his legal rights not to testify at all before the Commission, whether those rights be regarded as a misguided attempt to claim his privilege against self-incrimination or on other legal grounds. For now appellant has testified, and the overall proceeding in which he is engaged with the Commission has entered a second and altogether different legal and factual posture from that concerned with this appeal.

Moreover, on July 22, 1959, following his testimony before the Commission, appellant applied to the Supreme Court of the State of New York, New York County, for an order directing his release from confinement on the ground that by testifying he had finally complied with the terms of the order and warrant by which he had been committed originally. On July 30, 1959, Mr. Justice Backer of that Court

granted appellant's application and he was released from confinement. Shortly thereafter a Justice of the Appellate Division of the Supreme Court imposed upon appellant, as a condition of release, $5,000 bail pending the Commission's appeal from Mr. Justice Backer's decision. That appeal is in the process of preparation and is expected to be heard in the early fall of this year.

Thus the issue between appellant and the Commission in this second phase of the proceeding solely concerns the question of whether or not the particular nature of the responses made by appellant to the Commission's inquiries on July 21, 1959 were in compliance with the order and warrant of commitment. It is the contention of the Commission that appellant's answers were so false, evasive and obstructive of the Commission's inquiry that they are tantamount in law to no answers at all and appellant has not thereby complied with the legal requirements for his release. That issue, which has no relation to the issues presented by appellant in this appeal before this Court, has yet to be passed upon by the appellate courts of New York.

Appellant's testimony at the public hearing renders his appeal to this Court moot. There are no issues presented on this appeal by appellant which were not so rendered moot by his testimony on that occasion. Through no analysis could it be said at this point that there is a pending controversy existing between appellant and the Commission of Investigation regarding the legality of the order and warrant by which he had been committed originally or appellant's

right to refuse absolutely to make any answers whatsoever.

The crux of the appellant's position in this appeal is his alleged right not to testify. But he has testified. By this action ". . . he has left nothing to litigate." *Brownlow* v. *Schwartz*, 261 U. S. 216, 218 (1923). To the same effect: *St. Pierre* v. *United States*, 319 U. S. 41 (1943); *Richardson* v. *McChesney*, 218 U. S. 487 (1910).

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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